Barry-Wehmiller Company *and* Local 23, International Federation of Professional and Technical Engineers, AFL–CIO. Case 14–CA–15100

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 17 August 1982 Administrative Law Judge Irwin Kaplan issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent violated Section 8(a)(5) of the Act when it submitted its substitute bargaining proposal on 5 May 1981; that that failure to bargain in good faith converted the economic strike begun by the Union on 6 April into an unfair labor practice strike; and that the strikers thereupon acquired the right to be reinstated to their previous jobs as unfair labor practice strikers. The Respondent in its exceptions contends, inter alia, that the judge erred as a matter of law and misapprehended record evidence. The Respondent further asserts that the General Counsel did not demonstrate, nor did the judge find, the requisite factual predicate for some of his conclusions. We find merit in the Respondent's exceptions.

The Respondent and the Union have been parties to successive collective-bargaining agreements, with the one pertinent to the events herein expiring 1 March 1981. Following the Respondent's suggestion, the parties in November 1980 commenced early negotiations for a new collective-bargaining agreement.[1] This was in part because the parties agreed that substantial portions of the contract's language were no longer applicable, and/or required revision or correction, and partly because the Respondent's new vice president for human resources Charles Borchelt and chief negotiator Edwards wished to make some substantive revisions. Neither Borchelt nor Edwards had been involved in negotiation of the prior agreement, although union negotiator Brockmeyer had been. When no agreement was reached by 28 February, the parties extended the existing contract, with the understanding that negotiations would be concluded by 3 April. Further bargaining culminated in a round of negotiating sessions on 1, 2, and 3 April, and the Respondent on the latter date provided a written final package together with copies for the Union's negotiators to present and explain to the Union's membership at a meeting previously scheduled for that weekend. Later that same evening, Brockmeyer called the Respondent's negotiators to say that the membership had voted to reject the contract package and to strike, and that Brockmeyer wanted to meet to begin further negotiations later that night, to which Edwards demurred.

The Union struck beginning at 7 a.m. on Monday, April 6. The Respondent continued to operate the engineering department with employees who continued to work during the strike, with salaried employees transferred from elsewhere in the Company, and with supervisory personnel. The parties met with a Federal mediator on 13 April, with no change in their respective positions. The next meeting was scheduled for 5 May. In the interim, on 20 April, production and maintenance employees represented by the Machinists Union, who had initially honored the picket line, all returned to work. Thus, well before the next scheduled meeting, the Respondent had in effect successfully weathered the strike—and the relative bargaining strength of the parties had shifted in the Respondent's favor. Prior to the 5 May meeting, the Respondent had made an assessment of the situation in view of its continued successful operation, and had drawn up proposed changes to its 3 April offer. After the Union again rejected the 3 April offer, the Respondent withdrew that package, and proffered the new proposal with its proposed changes incorporated into the earlier offer, explaining the changes in detail to the Union.

The judge's finding that the Respondent failed to bargain in good faith on 5 May seems premised in large part on his subjective evaluation of the substantive nature of the Respondent's contract offers—which he referred to as a "series of regressive proposals." He apparently concluded that the Respondent had not demonstrated sufficient justification for the changes, and coupled that with the fact that the Respondent on 5 May first reoffered the 3 April package to the Union, a course for which he seemingly did not perceive a satisfactory explanation. We disagree.

First, although the judge alluded to the "totality of the circumstances" cited in *Chevron Chemical Co.*, 261 NLRB 44 (1982), we do not view his rather vague allusion as sufficient underpinning for his findings. Further, unlike the judge, we do not

[1] The record reflects that the Respondent, as early as September, attempted to initiate negotiations for a new contract.

deem application of the criteria set forth in *Chevron* itself to warrant the conclusion he reached. As we reiterated in that case, "it must be remembered that Section 8(d) does not 'compel either party to agree to a proposal or require the making of a concession . . . .' Thus, the Board does not, 'either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements,'"[2] absent unusual circumstances.[3] We find no such circumstances present in this case. We note that the other, unrelated, unfair labor practice alleged against the Respondent in the complaint herein was dismissed by the judge.[4] Also, here as in *Chevron*, above, we note that the parties have continued to maintain an ongoing bargaining relationship. The record reflects no refusal by the Respondent to meet and confer or provide information during the protracted negotiations. Nor was there any adamant refusal by the Respondent to make concessions in its bargaining positions,[5] or failure to provide justification for its bargaining posture.

Our consideration of the totality of the circumstances herein must also include the Union's conduct. In this respect we find it significant that, although asked to do so repeatedly, the Union declined to make a wage proposal during the negotiations, up to and including the sessions of 1, 2, and 3 April—instead demanding that the Respondent just give the Union its "best shot." Indeed, it is not contested that, although the Union then summarily rejected that offer, its negotiators did not even get together to consider a written counteroffer until after the 5 May meeting, and did not make any written counteroffers at all until late May.[6] The judge also impliedly criticized the Respondent for not accepting what he seemed to view as an ostensibly reasonable offer by Brockmeyer on 15 June; i.e., that the parties could probably "iron it out" and get a contract signed "that afternoon." We view the statement in a somewhat different vein, however, inasmuch as Brockmeyer's proposal was premised on then obtaining concessions *more* favorable to the Union than the Respondent's 3 April proposal—a proposal that the Union had thrice rejected and which, after the third rejection, had been withdrawn and replaced by the 5 May offer, some 6 weeks before Brockmeyer's suggested "ironing out."[7] Indeed, even the Union's subsequent letter offering to return to work was predicated on accepting the withdrawn 3 April contract proposal. The judge recognized this in the related context of his discussion of strikers, where he did not find the Union's letter to constitute an unconditional offer to return to work.

As noted in *Hickinbotham Bros. Ltd.*,[8] "A strike is a two-edged sword. Depending upon how it affects the employer's operations, the strikers may gain concessions or they may lose concessions previously obtained." We note here the judge's comment in footnote 19 of his decision that Edwards viewed Brockmeyer's proposed changes to the already withdrawn 3 April proposal as "something less than we proposed from the company's point of view," and the judge's conclusion that such testimony tends to corroborate a "take it or leave it" attitude. He subsequently found that the Respondent acted improperly by withdrawing proposals "without offering any legally sufficient justification," thereby demonstrating an intransigence and intent to "frustrate the bargaining process." We disagree and find those conclusions not supportable on this record. They appear to presuppose that the Respondent was obligated to offer the Union more than it had earlier, or demonstrate "just cause" for not doing so, as initially alleged in the complaint and argued by the General Counsel; but that is not the applicable test.

Here, the Respondent as noted had successfully weathered the strike before the parties' 5 May meeting, and the passage of additional time merely served to enhance that advantage. Moreover, in addition to the flexing of its economic muscle, the Respondent had specific reasons for changes in its proposals. Some were reversions to earlier or original proposals which it had modified in attempting

[2] *Chevron*, above at 46 (citation and footnote omitted).

[3] *Ibid.* and fns. 6, 10.

[4] See ALJD at fn. 22.

[5] Moreover, the Respondent offered to put any agreed-upon contract into effect at the time of ratification, as an incentive to the Union to obtain early agreement.

[6] At par. 9 in sec. III(b)(1) of his decision, the judge concludes that the Respondent's ability to weather the strike would not explain why on 5 May it first "offered" the April package to the Union. However, the Union as well as the Respondent was presumably aware that the Respondent had successfully weathered the strike. Thus, the Respondent could reasonably be concerned that, if it abruptly withdrew the 3 April package as its first move, it might be accused of doing so in anticipation that the Union, having risked the strike and been unsuccessful, was about to accept that package in recognition of its diminished bargaining strength. Similarly, we disagree with the judge's characterization of Edwards' reason for temporarily withdrawing the 5 May proposal as "incredible." In view of the facts that Edwards was the Respondent's principal negotiator, that he was going to be out of town for a week when matters were changing considerably due to the Respondent's already-made decision to offer permanent replacement status to employees who had worked during the strike, and the knowledge that an out-of-work list would be required, we do not find it so unreasonable that Edwards would deem it inappropriate for Brockmeyer to seek to negotiate matters with someone who was not familiar with all aspects of the situation, and who might not have dealt with Brockmeyer's attempts to accept or renegotiate from the previously withdrawn 3 April proposal.

[7] In this context, we find that the Respondent's subsequent insistence that the Union "take or leave" the 5 May proposals, and the Respondent's later withdrawal of the 5 May proposals, were rational positions in light of the Union's insistence on discussing the old 3 April proposals.

[8] 254 NLRB 96, 102 (1981).

to secure agreement without a strike; thus the basis for those concessions no longer existed. Some were engendered by circumstances relating to the strike (e.g., paying employees for time spent in negotiations). Other reasons appeared to be the same as those advanced when the Respondent made its initial proposal. While the judge appears to have viewed the Respondent's reasons as insufficient justification for withdrawing or revising its proposals, we are not similarly persuaded. As stated in *Hickinbotham*, above at 102–103, "It is immaterial whether the Union, the General Counsel, or [the Administrative Law Judge] find these reasons totally persuasive." What is important is whether they are "so illogical" as to warrant the conclusion that the Respondent by offering them demonstrated an intent to frustrate the bargaining process and thereby preclude the reaching of any agreement.[9] We do not find that to be the case here. Nor do we find that the Respondent's proposals can fairly be characterized as so harsh, vindictive, or otherwise unreasonable as to warrant the conclusion they were proffered in bad faith.[10] As noted above, the parties here maintained an ongoing relationship, and the record in our view reflects no conduct by the Respondent away from the bargaining table which would suggest that its bargaining positions were taken in bad faith.[11] Hence we dismiss the 8(a)(5) allegations. It follows therefore and we find, contrary to the judge, that the strike remained an economic strike.[12]

The judge also concluded that, even assuming the strikers remained at all times economic strikers, which we have found to be the case, the Respondent nevertheless violated Section 8(a)(3) by not properly reinstating some of them following their offers to return to work. We do not agree. First, we find this conclusion somewhat puzzling inasmuch as this contention was neither alleged in the complaint nor litigated as a violation. Rather, the entire thrust of the General Counsel's argument here appears to have been that the strike was converted to an unfair labor practice strike by virtue of the Respondent's purported refusal to bargain. Although counsel for the General Counsel in an apparent aside asserted that the Respondent acted unlawfully with respect to certain strikers' reinstatement even as economic strikers, that argument was in turn grounded on his assertion that the Respondent testified that the strikers "were replaced by temporary transfers." Counsel apparently misperceived the evidence in that regard, however, and we find it beyond dispute that all of those who worked during the strike were offered—and accepted—permanent replacement status *before* the stipulated dates on which strikers offered to return to work. The Respondent thereafter prepared and offered to the Union an out-of-work list and a return-to-work procedure for recalling strikers as openings became available. That procedure is in evidence, was followed by the Respondent, and was not alleged to be unlawful. Further, we see no warrant on this record for rejecting the unrebutted testimony that, for legitimate business reasons, there were fewer unit jobs available after the strike. Had the General Counsel wished to attempt to refute such testimony or present contrary evidence in rebuttal,[13] he could have done so, but apparently chose not to. Employees Rohr and Bergfeld were offered jobs as draftsmen after the strike, rather than leaders. Bergfeld accepted the offer and returned to work, while Rohr declined the offer. At Rohr's last review, some 6 months prior to the beginning of the strike, he had been informed that his performance as a section leader was unsatisfactory and that he must improve or he would have to be demoted. He would have been due for another review shortly after the strike commenced, which of course was not feasible. Hence when it came time to offer Rohr a position, he was informed that it would be with the demotion to draftsman. Bergfeld similarly was reviewed approximately 6 months prior to the strike and was informed that his performance was unsatisfactory and must be improved; and the unrebutted testimony is that he also would have been demoted in any event upon the review due at the time of the strike. Thus, the change was made effective upon his return to work. The testimony of the Respondent's

[9] Id. at 103.

[10] See *Chevron*, above, 261 NLRB at 46, and fn. 10.

[11] Id. at 47, fn. 11.; cf. *Safeway Trails, Inc.*, 233 NLRB 1078 (1977).

[12] In view of this finding, we deem it unnecessary to reach the Respondent's additional contention that the judge erred in finding that the strike was converted to an unfair labor practice strike, without demonstrating the requisite causal relationship. We note in this connection, however, Brockmeyer's testimony that the two major issues preventing the parties from reaching agreement were sick leave and the wage scale; and that he told the Respondent that on 15 June and "every time we met from November on to June 15th." But the record shows no substantial change in these two areas between the 3 April and 5 May offers (except that the latter did not make the wage rate retroactive to 2 March.) If those were indeed the principal factors influencing the employees' initial decision to reject the Respondent's 3 April offer and to strike, it is difficult to see how their retention in the 5 May offer would therefore convert the strike to an unfair labor practice strike: particularly when they were not alleged to be unlawful in the first instance. Similarly, accepting Brockmeyer's testimony as to the overriding importance of wages at face value renders all the more significant the Union's failure to come forth with a wage proposal during the prestrike negotiations. See above, at fn. 6 and accompanying text.

[13] Similarly, we see no reason to reject such unrebutted testimony here merely because the Respondent did not initially proffer additional documentation to buttress its uncontested evidence. Even if such evidence were rejected, however, there would not in our view be sufficient facts to conclude that the General Counsel had made out a violation, even if alleged.

director of research and engineering, Staack, appears straightforward and was not contradicted. Staack further testified that the standard procedure is that employees were provided a copy of review appraisals, and that he himself had seen the appraisals on both Bergfeld and Rohr. Counsel for the General Counsel did not call either Rohr or Bergfeld, nor any other witness, to rebut Staack's testimony, which thus stands uncontroverted. Accordingly, in light of the foregoing, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, dissenting.

Contrary to my colleagues, I would find, in agreement with the judge, that the Respondent failed to bargain in good faith with the Union in violation of Section 8(a)(5) of the Act.

As more fully set forth by the judge, the Respondent about 5 May 1981 went beyond mere hard bargaining in its negotiations with the Union and, by submitting a series of regressive proposals together with a take-it-or-leave-it attitude, demonstrated an intention to frustrate the bargaining process. The 5 May meeting was the first face-to-face meeting of the parties since the commencement of the strike a month previously. The Respondent briefly repeated its prestrike offer of 3 April but once again permitted no modifications or negotiations over the terms of that offer. When the Union predictably rejected that offer—the terms of which were more unfavorable to the Union than those of the recently expired collective-bargaining agreement—the Respondent withdrew that offer and substituted a yet more regressive proposal on a take-it-or-leave-it basis.

The Respondent's 5 May offer contemplated changes from the 3 April offer in the management-rights provisions, the grievance procedure and arbitration, seniority, working hours, vacations, medical insurance, the retirement plan, and the duration of the new proposal also required unit employees to sign new checkoff authorizations, eliminated payment for time spent by employees in negotiating sessions, and eliminated payment of double time for overtime. Several of the changes affected provisions on which the parties had reached tentative agreement. The judge discredited the Respondent's purported legitimate business reasons for these sweeping changes and further discredited the Respondent's assertion that it was willing to bargain in good faith over the 5 May offer.[1] At no time did the Respondent agree to negotiate concerning that proposal or do more than merely explain its terms to the Union. Even after the Union submitted counterproposals on 28 May, the Respondent repeated that it was not interested in negotiating changes in its 5 May proposal.

Following this rebuff, the Union was unable to reach the Respondent until 15 June. Although the Respondent then briefly led the Union to believe that it was willing to meet with the Union as requested, the next day it withdrew from the table both the 5 May and the 3 April offers. The following day the Respondent began the process of hiring permanent replacements for the striking employees. The Respondent did not reinstate its 5 May offer—with three modifications of a still more regressive nature—until 26 June.

I would find, in agreement with the judge, that this course of bargaining by the Respondent demonstrates an overall intransigence and a design to frustrate meaningful bargaining that is inconsistent with the requirements of Section 8(d) of the Act. Simply because the Respondent successfully weathered the strike does not give it license thereafter to refuse to bargain in good faith with the Union. Here, the Respondent withdrew earlier proposals without good cause, including some on which tentative agreement had been reached, substituted proposals ever more advantageous to itself, insisted that the Union "take it or leave it" and refused to engage in serious negotiations concerning its 5 May offer, and, finally, withdrew any offer from the table between 16 and 26 June. Relying on the totality of these circumstances, I would conclude that the Respondent engaged in bad-faith bargaining after 5 May. *General Athletic Products Co.*, 227 NLRB 1565, 1574–76 (1977); *Pacific Grinding Wheel Co.*, 220 NLRB 1389, 1390 (1975), enfd. 572 F.2d 1343, 1348–49 (9th Cir. 1979).[2]

The majority's contrary assessment of "the totality of the circumstances" is seriously flawed. In citing the Respondent's willingness "to meet and confer or provide information" or "to provide justification for its bargaining posture," the majority evidently confuses the willingness of company negotiators to *explain* their proposals with bargaining in good faith over those proposals. Its further assertion that the Respondent did not "adamant[ly] refus[e] to make concessions in its bargaining positions" is contradicted by its own admission that the

[1] The majority conveniently ignores or glosses over these credibility resolutions.

[2] Cf. *O'Malley Lumber Co.*, 234 NLRB 1171, 1180 (1978); *World Publishing Co.*, 220 NLRB 1065, 1071–72 (1975), enfd. 545 F.2d 1138, 1143 (8th Cir. 1976), *Pittsburgh-Des Moines Corp.*, 663 F.2d 956, 959–960 (9th Cir. 1981), in which retraction of proposals was found lawful *in the absence of* other evidence of bargaining in bad faith.

Respondent "insist[ed] that the Union 'take or leave' the 5 May proposals."

In addition, the majority fails to accord any weight to the fact that the Respondent withdrew its offer from the bargaining table for 10 days. The majority unpersuasively asserts that this tactic was not "unreasonable" since the Respondent's principal negotiator was leaving town for a week. Surely the Respondent could have simply scheduled the next negotiating session for after the negotiator's return if it had genuinely feared the continuation of negotiations in his absence. The judge reasonably rejected this proffered explanation as "incredible," especially in light of evidence that the Respondent did not reinstate its offer—in modified form—until after the Union had filed charges with the Board.

The majority also erroneously finds significance in an "ongoing bargaining relationship" between the parties. The only "bargaining relationship" between the parties is the tenuous one at issue here.[3] The majority of the reliance on *Chevron Chemical Co.*, 261 NLRB 44, 46–47 (1982), is misplaced since, in *Chevron*, the employer and the union had an ongoing, evidently harmonious bargaining relationship with respect to another unit of the employer's employees that provided a broader perspective within which to assess their respective bargaining positions.[4] Finally, the majority's attempt to shift the onus for the Respondent's tactics to the Union is unpersuasive. It fails to point to any alleged misconduct by the Union that makes it impossible to test the Respondent's good faith or that could be viewed as excusing the Respondent's take-it-or-leave-it attitude, its refusal on and after 5 May to do more than "explain" its proposals, and its withdrawal of its 5 May proposals.[5] Contrary to the majority's implication, the Union was under no constraint to make a wage proposal in early April since the parties had agreed to postpone discussion of economic items until after agreement on the noneconomic items. When the Union made a written counteroffer on 28 May—only the second bargaining session after the strike began—the Respondent said that it was not interested in discussing changes from the 5 May proposal. On 15 June the Respondent refused even to meet with the Union, and then it withdrew all offers from the table. Thus, whether or not the Union was overly optimistic in its belief that the parties could iron out their differences, as the majority suggests, the Respondent's conduct made any agreement impossible. *Holmes Detective Bureau*, 256 NLRB 824, 824–825 (1981).

In sum, for the above reasons and those stated by the judge, I would find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith with the Union.[6]

[3] At the time of the hearing, this "relationship" consisted of some discussions between a union pension plan trustee and the Respondent concerning the pension plan.

[4] That two other unions represented certain of the Respondent's employees is hardly germane to the relationship between the Respondent and the Union.

[5] Indeed, the majority concedes that the Respondent insisted that the Union "take or leave" the 5 May proposals and later withdrew those proposals, yet it nevertheless terms these tactics "rational positions" in view of "the Union's insistence on discussing the old 3 April proposals." In fact, the credited testimony shows that virtually all the Union's counterproposals were directed to terms contained in the Respondent's 5 May offer, in large part to terms which had remained unchanged from the 3 April offer, but also to terms which were new on 5 May.

[6] I would also find, in agreement with the judge, that the Respondent's bad-faith bargaining converted the strike from an economic to an unfair labor practice strike. Contrary to the majority's position, the Union's initial objections to certain proposals in the Respondent's April offer and its reasons for commencing the economic strike are irrelevant. Since the Respondent unlawfully prevented any meaningful negotiations concerning the terms of the April offer after 5 May, when it withdrew that offer and substituted a more regressive proposal in bad faith, the Respondent seriously impeded the success of the negotiations and thus prolonged the strike. *Randle-Eastern Ambulance Service*, 230 NLRB 542 (1977), enf. denied on other grounds 584 F.2d 720 (5th Cir. 1978); *Safeway Trails, Inc.*, 233 NLRB 1078, 1082 (1977).

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge. This case was tried in St. Louis, Missouri, on October 28 and 29, 1981. The underlying charges were filed on June 22, 1981, by Local 23, International Federation of Professional and Technical Engineers, AFL–CIO (Local 23 or Union), alleging that Barry-Wehmiller Company (Respondent or the Company) engaged in certain acts and conduct violative of Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act). The aforenoted charges gave rise to a complaint and notice of hearing, which issued on August 5, 1981.

More particularly, it is alleged that about May 5, 1981, Respondent rescinded an earlier contract proposal and submitted a new package which by its terms afforded less favorable terms and conditions than those specified in the said earlier proposal under circumstances and for reasons violative of Section 8(a)(5) of the Act. It is also alleged that about June 16, 1981, Respondent, "without just cause," withdrew all outstanding proposals thereby additionally violating Section 8(a)(5) of the Act. Further, it is alleged that about June 26, 1981, Respondent, "without just cause, submitted a revised formulation" of its May 5, 1981 contract proposal which afforded less favorable terms and conditions than prior proposals under circumstances and for reasons violative of Section 8(a)(5) of the Act.

With regard to the 8(a)(3) allegations, it is asserted that since about May 5, 1981, Respondent, by the aforenoted acts and conduct, unlawfully prolonged a strike which commenced on April 6, 1981, and that Respondent in violation of Section 8(a)(3) of the Act refused to

reinstate certain striking employees who had unconditionally offered to return to their former positions.

It is also alleged that Respondent independently violated Section 8(a)(1) of the Act by informing certain unit employees that it would delay contract negotiations with the Union.

Respondent filed an answer conceding inter alia jurisdictional facts, but denying all allegations that it committed any unfair labor practices. According to Respondent, the changes in the disputed May 5, 1981 contract offer from its earlier proposal were predicated on legitimate business considerations and not to punish employees for striking, as contended by the General Counsel.

On the entire record, including my observation of the demeanor of the witnesses, and after careful consideration of the posttrial briefs,[1] I find as follows.

FINDINGS OF FACT

I. JURISDICTION

Respondent Barry-Wehmiller Company is a Missouri corporation engaged in the business of manufacturing bottle washers and pasteurizers for breweries. In connection therewith, Respondent operates two facilities in St. Louis, Missouri, and during the 12-month period ending July 31, 1981, and at all other times material herein, Respondent derived revenue in excess of $50,000 directly from points outside the State of Missouri. It is alleged, Respondent admits, and I find that said Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is alleged, Respondent admits, and I find Local 23, International Federation of Professional and Technical Engineers, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*

In 1945, pursuant to an Agreement for Consent Election in Case 14-RC-1312, Local 23 and the International Association of Machinists, IAM District No. 9, AFL (herein the Machinists), were jointly certified in an all employee unit of the Company, including working foremen and engineering department employees, but excluding categories of employees not relevant herein. (R. Exh. 1.) Subsequently, the parties agreed to sever the drafting and engineering employees from the overall unit. Local 23 was designated as the exclusive collective-bargaining representative for the severed drafting and engineering unit and the Machinists as the exclusive bargaining agent for the larger group of other production and maintenance employees.[2] (R. Exh. 2, p. 2.) The most recent collective-bargaining agreement covering the drafting and engineering unit was effective by its terms for the period February 1, 1978, until March 1, 1981. On November 12, 1980, representatives of Respondent and Local 23 met for the purpose of negotiating a new collective-bargaining agreement. Respondent's negotiating team included Charles Borchelt, vice president of human resources and its chief negotiator, and Attorney Ralph Edwards. Local 23's chief negotiator was Ronald Brockmeyer and other members of its negotiating team included employees Andy Cherven, Ralph Donley, and Doug Kleinberg. While Brockmeyer had been deeply involved in negotiating the most recently expired contract, this was the first time Borchelt and Edwards were involved in contract negotiations with Local 23. The Company's representatives made it known early in the negotiations that they were unhappy with the language contained in the then still outstanding contract and proposed substantial revisions which it asserted were essentially procedural in nature. Brockmeyer, however, contended that some of these changes were substantive. The parties, using the then still outstanding contract as a frame of reference, negotiated the noneconomic items first. The agreements reached on any of the provisions were tentative until total agreement on a package was reached. Each article of the new contract was contained on a separate page and as the parties reached tentative agreement thereon, the parties signified their approval by initialing and dating the document. Borchelt offered retroactive pay if an agreement could be achieved prior to the March 1 expiration date of the then outstanding contract. At some point, the parties verbally agreed to extend the contract to April 6. Borchelt continued to be the Company's chief spokesperson over the next three bargaining sessions which were held on November 26 and December 5 and 17. Thereafter Edwards assumed the role as chief negotiator because Borchelt became actively involved in contract negotiations with the Machinists and did not rejoin negotiations with Local 23 until about March 11.

On January 7, 1981,[3] the parties reached agreement on a number of noneconomic articles.[4]

The parties conducted bargaining sessions on April 1, 2, and 3 with the Company submitting a final package which included the money items in late afternoon of

[1] The General Counsel's unopposed motion to correct the transcript dated December 30, 1981, is granted and received in evidence as G.C. Exh. 8. Further, the General Counsel's motion to strike Respondent's reply brief is also granted. While it is noted that the reply brief was submitted in the form of a letter dated January 19, 1982, it is immediately apparent that the communication is actually a reply brief. As stated in the first paragraph of the letter: "This letter clarifies certain misstatements or mischaracterizations of the record which appear in General Counsel's Brief." In the absence of leave to file a reply brief and as the Board's Rules and Regulations do not otherwise contain provision for the filing of reply briefs, the letter shall not be deemed as part of the record and has been marked. "Resp. Exh. 12, rejected." See *Lehigh Lumber Co.*, 230 NLRB 1122, 1128 fn. 35 (1977).

[2] In April 1981, there were approximately 26 employees in the drafting and engineering unit represented by Local 23, and approximately 350 production and maintenance employees represented the Machinists. Respondent also employs approximately 35 employees who are represented by the Boilermakers. While it is noted that there is no evidence of any unfair labor practices involving the Boilermakers, the collective-bargaining history with that union is not otherwise germane to the issue involved herein.

[3] All dates hereinafter refer to 1981 unless otherwise indicated.

[4] This included articles on the preamble, union security, checkoff, hours of work, overtime, and duration. (See G.C. Exh. 3, which document also lists other provisions tentatively agreed to over a period covering the next several bargaining sessions through March 31.)

April 3. The Company was aware that the Union had previously scheduled a membership meeting at 5 p.m. that day and prepared the final package for the memberships' consideration at that time.[5] Approximately 15 minutes later Brockmeyer phoned Borchelt and told him that the union committee had unanimously rejected the Company's proposal. Brockmeyer told Borchelt that the package was essentially the same as had been offered the previous day and that the parties needed to discuss the proposal further but was told in turn that Respondent was not interested in negotiating further changes. Later that evening the membership voted to reject the contract and to strike. Brockmeyer contacted Edwards at approximately 8:30 p.m. that day and told him that the contract package had been rejected and that the membership voted to strike and asked for another negotiating session either that evening or over the weekend. A meeting could not be arranged as Respondent was unwilling to meet at that time.

A strike commenced at 7 a.m. on April 6. The legend on the picket signs read "On Strike, Barry-Wehmiller Company Local 23," or words to that effect. The Company did not hire any replacements but elected to transfer salaried employees employed elsewhere at the Company and utilize supervisory personnel to handle the workload. There were also two probationary employees in the engineering department who continued to work during the strike.[6]

The next meeting was on April 13 when the parties met separately with the Federal Mediator. There was no further movement nor negotiations at this time and the Company advised the mediator that it was no longer offering retroactive pay which it was willing to provide in the absence of a work stoppage. The next meeting was on May 5 which was the first session in which the parties met face-to-face since the Company's offer of April 3. At this session, Edwards presented Brockmeyer with a new proposal which admittedly was more advantageous to the Company and less advantageous to the Union than the April 3 proposal. Thus, under article 7 of the May 5 proposal, unit employees were required to sign new checkoff authorizations, a condition not required by Respondent's contract package offer of April 3. Further, under article 8.03 of the May 5 proposal dealing with union respresentation, the Company added a provision stating that employees on the bargaining committee would no longer be paid for time spent in negotiating sessions, a departure from practice under previous contract and the April 3 proposal.[7]

In its May 5 proposal, the Company also limited the time period in which employees may file grievances over layoffs or discharges to 5 days (G.C. Exh. 2(c), art. 12.03), whereas there was a 15-day limit under the April 3 proposal (G.C. Exh. 2(b), art. 12.03), and no time limit under the expired contract (G.C. Exh. 2(a), art. XIII). Another change in the grievance procedure and arbitration (G.C. Exh. 3(c), art. 12.07) provided that all expenses of the arbitration were to be borne by the parties, whereas, under the April 3 offer the losing party was charged with such expenses (G.C. Exh. 3(b), art. 12.07).

Still further changes in the May 5 proposal involved seniority, working hours, and overtime. Thus the May 5 proposal, inter alia, reduced the time period in which nonworking employees lose their seniority (G.C. Exh. 3(c), art. 14.02), whereas seniority was the only consideration under the recently expired contract and the April 3 proposal (G.C. Exh. 2(a), art. IV and G.C. Exh. 2(b), art. 15.04). With regard to the change in hours, the regular schedule was from 7:45 to 11:45 a.m. and from 12:15 to 4:15 p.m. Monday through Friday and any change thereon had to be mutually agreed on by the Company and the Union. This was changed by the May 5 proposal in article 17.02 as follows:

> 17.02 *Schedules of Hours*: Starting time for the (lst) shift shall be between the hours of 6 A.M. and 9 A.M. Starting time for the (2nd) shift shall be between the hours of 2 P.M. and 5 P.M. Any change in the regular schedule of hours shall be posted by the Company (1) week in advance of such change. [G.C. Exh. 3(c).]

As noted above, the May 5 proposal also proposed changes in the overtime provisions. For example, under the old contract and in the April 3 proposal payment for work performed on Saturdays was on the basis of the time and a half for the first 4 hours and double time thereafter; whereas, double time was eliminated entirely under the May 5 proposal (cf. G.C. Exh. 2(a), (b), and (c); art. V; and art. 17.00, respectively).

Some of the changes in the May 5 proposal involved subjects in which the parties had reached tentative agreement back in January and had been incorporated by Respondent in its April 3 offer, i.e., checkoff, hours of work, representation, and duration of agreement. (G.C. Exh. 3.) According to Respondent, the April 3 proposal was more generous than its subsequent offer and it had reached agreement with the Union on certain provisions which it would have otherwise objected because it had hoped to avoid a strike.[8] Since a strike ensued nonetheless, which the Company successfully weathered and as the relative bargaining strength of the parties assertedly changed with the passing of time, Respondent contended

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[5] The General Counsel asserted that Respondent's written offer of April 3 was "obviously less advantageous" to the Union than the contract which was about to expire. It is noted, however, that the complaint does not allege that Respondent bargained in bad faith in violation of Sec. 8(a)(5) at any time prior to May 5.

[6] The Company operates two facilities in St. Louis, one located at West Florissant Street, and the other approximately 5 miles away at Hall Street. While the employees comprising the engineering unit are employed at the West Florissant Plant, the larger Machinists unit of approximately 350 employees are employed at both locations. The Machinists honored the picket lines at both plants until April 20 at which time they returned to work.

[7] Other changes from the April 3 proposal involved the management rights provision (art. 9.02), grievance procedure and arbitration (arts. 12.03 and 12.07), seniority (art. 14.02), changes in force (arts. 15.01 and 15.03), hours of work (art. 17.02), overtime (art. 18), vacation (art. 22.02 and 22.06), medical insurance (art. 24.00), retirement plan (art. 25), and the proposed duration of their agreement (art. 27). See G.C. Exhs. 2(a), 2(b), 2(c), a comparison of the expired contract, the April 3 proposal, and the offer of May 5. Some of these changes are more fully described in the body of this section.

[8] There is no evidence tending to show that the Union contemplated a strike prior to the submission of this formal proposal.

it was therefore free to offer a new package much more to its liking. Further, Respondent contended that the changes in the May 5 proposal were predicated on legitimate business reasons and not, as the General Counsel contends, to punish the employees for going out on strike. For example, according to Borchelt reliance on strict seniority vis-a-vis layoffs, recall, and overtime as per the old contract and the April 3 proposal presented an anomolous situation. He testified as follows:

> As it regards this particular provision, this Company is involved in doing work on more than one product line. And if a man is skilled in drafting, in the pasteurizer area, he may not be skilled in drafting in the washer area. If you're forced to try and allocate overtime on seniority basis and all of the overtime is in the washer area, you can not put unskilled men in that area solely for the purpose of equitable distribution of the overtime. And this has been a problem in the past.

Borchelt provided essentially the same explanation for the Company's new ability to do the work test as stated in the May 5 proposal regarding layoffs and recall of employees.[9] While Brockmeyer conceded that Edwards explained the various changes in the May 5 proposal, he asserted that the former refused to discuss or negotiate any of these items.

Brockmeyer met with Edwards again on May 28. According to Brockmeyer, he went over the May 5 proposal with Edwards and noted a number of areas where he thought the parties could reach a mutual understanding and that Edwards then left to confer with Borchelt. As testified by Brockmeyer, when Edwards got back to him he told Brockmeyer to take it or leave it because the Company was not interested in negotiating changes from the May 5 proposal. While Edwards acknowledged that Brockmeyer told him that he did not think the parties were very far apart, Edwards asserted that Brockmeyer was addressing himself to the April 3 proposal which was no longer on the table and not the May 5 proposal which was the only offer then outstanding. With regard to some of the counterproposals made by Brockmeyer, Edwards told him that he would discuss the matter with the Company and get back to him as to whether they had a contract. According to Edwards, within a few days he contacted Brockmeyer and told the latter that the Company was not interested in making any changes and that the April 3 proposal was not a basis for making an agreement. Brockmeyer testified that he called Edwards on several occasions after May 28, but did not get to talk to him until June 15. Brockmeyer also testified that he told Edwards on June 15 that if they met that afternoon the parties could probably reach an agreement as in his opinion there were only one or two areas of disagreement and that Edwards promised to get back to him right away.

Edwards' version of the June 15 conversation was substantially different. According to Edwards, he told Brockmeyer, inter alia, that since they had not met for approximately 2 weeks he thought it would be appropriate to send him a letter outlining the Company's bargaining position at that time. Edwards acknowledged that Brockmeyer asked for a bargaining session that day, but according to Edwards the latter told him that he was unable to meet with him and further that he would be unavailable for the rest of the week because he was leaving town. By letter dated June 16, Edwards wrote Brockmeyer withdrawing all of the Company's outstanding proposals, including both the April 3 proposal and the offer of May 5. Thus, in pertinent part, Edwards wrote as follows:

> In view of the foregoing, it is our position that all proposals have been withdrawn and there are no proposals outstanding. If that has not been clear then this letter will formally evidence the company's withdrawal of its proposal made May 5, 1981. [R. Exh. 6.]

About June 17, Borchelt phoned Brockmeyer and read to him the contents of a letter which he was going to send the striking employees advising them that the Company had begun the process of hiring permanent replacements. The June 17 letter reads in relevant part, as follows:

> It is the purpose of this letter to advise you that we have begun the process of hiring permanent replacements. A limited number of jobs are presently available for qualified individuals who are interested in being considered and who are available to report for work. Consideration will be given on a "first-come-first-served" basis dependent upon qualifications to perform the available work. [R. Exh. 7.]

Borchelt testified that he spoke to nine replacements on June 18 and they all accepted permanent positions. As noted previously, two of these individuals were probationary employees and the other seven had been transferred temporarily from other departments.[10] On June 18, the Union prepared a letter which was hand delivered to the Company advising Borchelt that the union membership voted to accept the April 3 offer and stating the Union's belief that the Company has failed to bargain collectively in good faith. Further the letter notified the

[9] I found Borchelt's testimony somewhat inconsistent and largely conclusionary. While Borchelt testified generally to unspecified problems in the past relative to overtime, layoffs, and recall, he also acknowledged that he did not follow strict seniority in assigning work and made changes without consulting the Union. In this regard, it is noted that Borchelt also testified that he did not know of any grievances as a result of such assignments and acknowledged at least that it had not been a "major problem." In these circumstances, I view Borchelt's reference to "problems" as an unsupported conclusion. Moreover, Borchelt's assertion that the-ability-to-do-the-work language was not included in the April 3 proposal because it was "overlooked" does not have the ring of truth and is rejected. In view of the foregoing and as I was otherwise unimpressed with Borchelt's demeanor, I find him to be an unreliable witness. Some of the other reasons advanced by Respondent for the changes in the May 5 proposal will be discussed more fully in the section below entitled "Discussion and Conclusions."

[10] None of the transferred employees were named or their status otherwise documented. Borchelt testified that at the time of the trial approximately five of the nine replacements were still doing bargaining work.

Company that striking employees are immediately available to report for work. (R. Exh. 8(a).) Edwards returned to his office on June 22 and learned that the Union had filed unfair labor practice charges. He called Brockmeyer and the parties scheduled a negotiating session on June 26.[11]

Edwards appeared at the June 26 meeting armed with the May 5 proposal and several modifications including a less attractive union-security clause for the Union's consideration. According to Edwards, he drafted a new union-security clause because he wanted to protect those employees who returned to work, the probationary employees and the seven permanent replacements from retaliation. Thus, anyone who was on the payroll as of April 3 and in the bargaining unit, or anyone who accepted the Company's offer to be a permanent replacement for a striker had no obligation to join or remain members of the Union during the term of the agreement (R. Exh. 9). Brockmeyer told Edwards that he would review the proposal with the membership but opined that if accepted "the company would have the transferees vote and . . . immediately decertify the unit [sic] so that there was no way we could accept that." Later that day the union membership voted to reject the proposal. The parties have not met since for the purpose of negotiating a new contract.

B. *Discussion and Conclusions*

1. The 8(a)(5) allegations

In essence it is alleged that Respondent violated Section 8(a)(5) by failing to negotiate in good faith a collective-bargaining agreement with the Union but rather engaged in a pattern of bad-faith conduct including the withdrawal of its previous proposals and substituting new ones even less favorable to the Union. According to the General Counsel, "Respondent has not demonstrated any legally acceptable justification for this conduct." Further, the General Counsel asserted that the Respondent's conduct reflected an intent to reach agreement on a contract only on its own terms which in effect represented nothing more than take-it-or-leave-it bargaining. Still further, the General Counsel asserted that Respondent's regressive proposals were made to punish the Union for the strike.

Respondent on the other hand asserted that it had reasonable and legally sufficient reasons for withdrawing and modifying its proposals, including a shift in the relative bargaining strength of the parties, as the Company's ability to weather the strike improved. Further, Respondent denied that it bargained in bad faith or that the changed proposals reflected any desire to punish the Union for the strike. Moreover, Respondent contends that it was the Union's conduct, not its own, that prevented the parties from reaching agreement.

The Company's duty to bargain as defined by Section 8(d) of the Act in relevant part is as follows:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

In short, the Act does not compel the parties to make concessions or to agree to any proposal but does mandate that they bargain in "good faith" for the ultimate purpose of reaching a collective-bargaining agreement. See *NLRB v. Insurance Agents*, 361 U.S. 477, 485 (1960); *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). On the other hand, it is well settled that a take-it-or-leave-it posture constitutes evidence of bad faith. See *General Athletic Products*, 227 NLRB 1565, 1574 (1977); *Federal-Mogul Corp.*, 212 NLRB 950 (1974), enfd. 524 F.2d 37 (6th Cir. 1975); *NLRB v. Insurance Agents*, supra. Further, the withdrawal, without good cause, of previously agreed-to proposals as is alleged to have occurred in the instant case can be strong evidence of bad faith. *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720, 725 (5th Cir. 1978); *NLRB v. American Seating Co.*, 424 F.2d 106, 108 (5th Cir. 1970). A determination of whether there was "hard bargaining" but in "good faith" on one hand or "bad faith" or "surface bargaining" on the other, is made on a case-by-case basis from an examination of the totality of the circumstances. See *Chevron Chemical Co.*, 261 NLRB 4 (1982); *Seattle-First National Bank v. NLRB*, 638 F.2d 1221, 1225-27 (9th Cir. 1981); *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1348 (9th Cir. 1978). It is often a thin line separating the permissible from the impermissible and generally provable through inferences drawn from circumstantial evidence. *Hudson Chemical Co.*, 258 NLRB 152, 154 (1981); *Seattle-First National Bank v. NLRB*, supra at 1227 fn. 9; *Chevron Chemical Co.*, supra.

Applying all of the foregoing principles to the instant case and after careful consideration of the "totality of the circumstances," I am persuaded that since about May 5 Respondent went beyond mere permissible hard line bargaining and instead adopted a take-it-or-leave-it approach. In reaching this conclusion I rely, inter alia, on Brockmeyer's credited testimony ascribing to Edwards a refusal to discuss or conduct meaningful negotiations, but only a willingness to explain the meaning of the new provisions.[12]

[11] According to the General Counsel, during the week of June 26, Borchelt had conveyed to several of the striking employees that the Company had no intention of reaching an agreement with the Union for a long time thereby violating Sec. 8(a)(1) of the Act. While Borchelt conceded that the subject of the June 26 negotiating session had come up in conversations with several of the employees, he denied telling them that the Company intended to delay negotiations. This allegation will be treated more fully infra.

[12] While Brockmeyer and Edwards were both at times conclusionary and somewhat unresponsive, I find on balance that the former was more

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At the pivotal May 5 meeting which was conducted at the office of the Federal Mediation and Conciliation Service, the parties met face to face for the first time since the Company submitted its package of April 3.[13] On that occasion Edwards asked the Union to accept its final package of April 3 without modification, and the Union refused. Edwards abruptly withdrew the April 3 proposal and handed Brockmeyer a new proposal which admittedly (Edwards' testimony) was more advantageous to the Company and conversely less attractive to the Union than the proposal it had just withdrawn.

At the trial, Edwards and Borchelt attempted to justify the long list of regressive proposals as contained in the May 5 package by stating variously, inter alia, that they represented the position the Company had held earlier (prior to the April 1–3 bargaining sessions), or in some cases the change involved something that had been "overlooked" in the offer of April 3, or simply that the change was "right" or "appropriate." Thus, as stated by Borchelt, the Company eliminated double pay for overtime because, "we felt it was appropriate to broach this particular subject at this time." Edwards testified in a similar fashion regarding the deletions and additions which culminated in the new arbitration provisions.[14] He asserted that the Company was in "good condition because of the strike," and "we had a reasonable chance of being able to obtain it under the circumstances that existed at that time." Regarding vacation benefits, Edwards testified that the Company reverted to computing vacation pay on a percentage of gross earnings, a position it held early in the negotiations and from which it departed in its April 3 proposal, "[b]ecause it was right."[15]

It is undisputed that Edwards went over the new proposal and explained the changes. However, Brockmeyer credibly testified that Edwards told him that he would not discuss the proposal, only explain its meaning. As testified by Brockmeyer:

> I told him (Edwards) that he was crazy because we weren't interested in accepting the April 3rd proposal, and the May 5th proposal was substantially less without any rationale.

I find, where, as here, the Company abruptly withdraws a "final package" because it is rejected, and then refused to engage in further bargaining on that package, but instead immediately substitutes a series of regressive proposals, that such conduct is not consistent with good-faith bargaining as required by Section 8(d) for purposes of reaching a common ground or ultimate agreement. Insofar as Respondent's assertion that it was then able to weather the strike and had gained the upper hand, this would not explain why it offered the April 3 package on that occasion.[16] In these circumstances, noting particularly that the Company declined to further negotiate the April 3 package, the offer was predictably unacceptable and I can only conclude that it was not made in good faith for purposes of reaching an agreement, except on its own terms, as subsequent events noted below tend to confirm.

Edwards and Brockmeyer met again at the mediator's office on May 28. On that occasion Brockmeyer made a number of counterproposals.[17] For example, he agreed to the 5-day limitation for filing grievances but only if the time began to run when knowledge of the Company's action was attained or in the alternative 15 days

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forthright and plausible than the latter. I also found Edwards somewhat evasive, particularly when asked to describe the proposals or counterproposals made by Brockmeyer on May 28. Of greater significance in terms of assessing Edwards' overall credibility was his incredible explanation for withdrawing all proposals in his June 16 letter to Brockmeyer, to wit, he did not want the parties to meet in his absence. The circumstances involving the letter will be discussed more fully in perspective infra. Under all the circumstances, including close observation of the demeanor of the witnesses, I credit Brockmeyer over Edwards in all material respects where the testimony is in conflict.

[13] About 4 p.m. on Friday, April 3, the Company gave the Union its then "final package" which for the first time included money items. To Brockmeyer (and the record supports), this package reduced some of the benefits which employees enjoyed under the recently expired contract. For example, a time limit of 15 days was set for the filing of grievances, whereas, under the old contract there was not any time limit. (Cf. G.C. Exh. 2(a) art. XIII with G.C. Exh. 2(b), art. 12.03.) Another change would permit salaried employees to do unit work. (G.C. Exh. 2(b), art. 5.01.) A still further change would have permitted the Company to subcontract or transfer unit work. (G.C. Exh. 2(b), art. 9.00.) Brockmeyer also opposed the money items. Approximately 1 hour later, Brockmeyer told Borchelt that he did not believe that the membership would accept this package and asked for more time to negotiate. This Borchelt refused to do, although he expressed a continued willingness to explain the proposal. Later that evening the membership rejected the offer and voted to strike. Borchelt urged Edwards to negotiate over the weekend but the latter refused and the strike commenced on Monday, April 6. The parties met separately with the Federal mediator on April 13. The only change on the occasion is that Respondent was no longer willing to provide retroactive pay.

[14] The new provision reduced the time for filing grievances involving discharge and layoff from 15 days (April 3 proposal) to 5 days (no time limit in the old contract) and the cost of arbitrating for the first time was to be borne equally by the parties rather than losing party as was provided under the old contract and April 3 proposal.

[15] As noted previously, some of the changes in the May 5 offer were on provisions which the parties had signed signifying their tentative agreement back in January: checkoff, hours of work, representation, and duration of the agreement. Edwards appeared less than forthright and unpersuasive in explaining why the Company rescinded its agreement to these provisions. For example, under the May 5 package, unlike the April 3 proposal, employees were required to sign new checkoff authorizations. According to Edwards' uncorroborated and unsupported testimony, he had doubt that the previous checkoff authorizations under the recently expired contract were still valid and after consulting with his law partner he decided to require new authorizations. Edwards, an experienced labor lawyer, conceded that he had not bothered to research the subject. It appears that Edwards' doubt was misplaced as the validity of the authorizations does not turn on whether or not the contract terminated. See *Frito-Lay*, 247 NLRB 137 (1979). In any event it is noted that Edwards was willing to rely on the old authorizations in the offer of April 3 which was still outstanding at the commencement of the May 5 session.

[16] It is of course now widely recognized that at times a party's withdrawal from portions of a proposal to which tentative agreement had been reached as well as the introduction of regressive proposals may constitute permissible hard bargaining. *Pittsburgh-Des Moines Corp. v. NLRB*, 663 F.2d 956 (9th Cir. 1981); *Pease Co. v. NLRB*, 666 F.2d 1044 (6th Cir. 1981). See also *Hickinbotham Bros. Ltd.*, 254 NLRB 961 (1981); *Chevron Chemical Co.*, supra. However, given the "totality of the circumstances," I am persuaded that Respondent's overall conduct transcends mere hard bargaining.

[17] At times, Edwards asserted that Brockmeyer's counterproposals were addressed to the April 3 offer and on other occasions to the May 5 package. At one point, Edwards, when asked to clarify responded, "It really doesn't matter, they're the same."

from the occurrence. Brockmeyer also made some substantive counterproposals relative to protecting unit work. Thus he wanted the Company to modify its new management right's provision to ensure that company action taken thereunder would not reduce the size of the bargaining unit. Further, he wanted a few words deleted from the provision on work assignments (art. 5.01) so that salaried employees would not perform unit work. Among other counterproposals made by Brockmeyer (as conceded by Edwards), they involved seniority, wage reviews, and "a ten percent across the board increase for all employees for each year of the contract."

Brockmeyer testified credibly that Edwards told him that he did not have the authority to accept the Union's counterproposals but would consult with Borchelt and get back to him.[18] Soon after, Edwards told Brockmeyer that the Company was "not interested in discussing any changes in their May 5 proposal. That was the proposal, take it or leave it."[19] As the Union refused to embrace the May 5 proposal on a take-it-or-leave-it basis, this offer was also subsequently withdrawn.

Over a 2-week period following the May 28 session, Brockmeyer called Borchelt and Edwards on a number of occasions but was unable to get through until June 15 when he finally reached Edwards. On that occasion, Brockmeyer pressed Edwards for an immediate meeting telling him "We could probably iron it out and get a contract signed that afternoon." Brockmeyer credibly testified that Edwards told him that he would get back to him right away. Any reason for Brockmeyer's apparent optimism was short lived. The next day the Company made it patently clear that it was not then interested in engaging in any serious negotiations for a contract. It rejected both its initial April 3 offer and its later proposal of May 5 as a basis for continued bargaining by withdrawing all proposals. Thus, by letter dated June 16, Edwards advised Brockmeyer in pertinent part as follows:

> [I]t is our position that all proposals have been withdrawn and there are no proposals outstanding. If that has not been clear then this letter will formally evidence the company's withdrawal of its proposal made May 5, 1981. [R. Exh. 6.]

While the record disclosed that the Union at that time was on the verge of accepting the April 3 package, that proposal had already been withdrawn on May 5 when the Union refused to accept it and Respondent then substituted the more regressive package. As noted and discussed above, Respondent contends it was justified in offering a new package albeit less favorable to the Union because of its ability to weather the strike and concomitantly its improved bargaining position, as well as its assertion that all changes were grounded on legitimate business considerations. If Respondent then displayed a genuine willingness to bargain over its new package, I would be inclined to conclude that Respondent's conduct amounted to permissible hard bargaining. Such, however, was not the case. As noted above, the May 5 package was offered on a take-it-or-leave-it basis. While Respondent offered various reasons for the multitude of changes to the April 3 package, the only explanation for withdrawing the May 5 proposal was Edwards' incredible statement that he was going to be out of town and, "We were at a stage in the negotiations where I felt that it would be inappropriate for the company to meet with Mr. Brockmeyer and my presence not be there." Edwards explained further that this out-of-town trip combined personal family business and a short vacation which had been planned for the last 6 to 8 weeks. This only helps explain Edwards' unavailability to meet and negotiate that week. In no sense can I perceive how Edwards' plans can amount to a justification for the Company withdrawing all proposals and specifically its May 5 offer. On the contrary, I find that Respondent by withdrawing all proposals without offering any legally sufficient justification further demonstrates Respondent's overall intransigeance and tends to persuade me that its intention was to frustrate the bargaining process.

By letter dated June 17, a day after the Company withdrew its May 5 proposal, Borchelt wrote to all striking employees advising them that the Company had begun the process of hiring permanent replacements. (R. Exh. 7.)[20] The next day the Union by letter dated June 18 (R. Exh. 8(a)) accused the Company of not bargaining in good faith as well as discriminating against employees because of their union activities, attaching thereto a copy of unfair labor practice charges alleging violations of Section 8(a)(1), (3), and (5). (R. Exh. 8(b).)[21] Borchelt was also advised that the union members voted to accept the April 3 proposal and that the striking employees were immediately available to report for work. (Id.)

When Edwards returned from his trip on Monday, June 22,[22] he learned about the Union's unfair labor

[18] Edwards conceded that he merely wrote down the various counterproposals and did not discuss any of them. He also conceded that he told Brockmeyer that he "would discuss it with the Company, and that [he] would give him [Brockmeyer] a response as to whether that [sic] would get a contract."

[19] While Edwards asserted that he told Brockmeyer that he would not enter into any contract on the basis of the April 3 proposal, he also conceded that none of Brockmeyer's proposals were agreeable to the Company. Edwards testified that Brockmeyer's changes constituted "something less than we proposed from the Company's point of view." As such, Edwards' testimony tends to corroborate the "take-it-or-leave-it" posture ascribed to him by Brockmeyer.

[20] As I have found that Respondent since about May 5 has bargained in bad faith in violation of Sec. 8(a)(5) as alleged, I also find that Respondent by such conduct prolonged the strike and converted it from an economic to an unfair labor practice strike. Thus, all strikers who had not been permanently replaced prior thereto were entitled to reinstatement upon their offer to return to work. In these circumstances, I find that Respondent's letter dated June 17 constituted an unlawful threat to permanently replace unfair labor practice strikers in violation of Sec. 8(a)(1). See *Laredo Coco Cola Bottling*, 241 NLRB 167, 177 (1979); *Sumter Plywood Corp.*, 227 NLRB 1818, 1822 (1977).

[21] The charge signed by Brockmeyer on June 17 was not formally docketed until June 22. (G.C. Exh. 1(a).)

[22] Borchelt spoke with Bobby Black, John Bradley, and Ralph Donley, striking employees, during the week of June 22 about their intentions to return to work. The General Counsel contends that Borchelt implied to them that Respondent would not bargain in good faith to reach an agreement. The credited testimony disclosed that Borchelt acknowledged that Respondent was still obligated to bargain and that the negotiations may continue for some time. I do not credit Donley's testimony (denied by Borchelt) that Borchelt told him that negotiations would con-

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practice allegations. He called Brockmeyer who in turn pressed Edwards for a bargaining session immediately, but the latter was unavailable until Friday, June 26. On that occasion Edwards met Brockmeyer at the mediator's office. Edwards handed Brockmeyer the May 5 proposal with three modifications and told him that if the Union accepted the package they had a contract. The modifications included a more limited union-security provision, an out-of-work procedure (for returning strikers), and a new contract termination date of June 30, 1982. (R. Exhs. 9, 10, and 11.) Brockmeyer told Edwards that he would have to review the package with the members but he did not expect them to approve it. In particular, Brockmeyer noted the union-security provision which he perceived as a company vehicle to be used to decertify the Union. The new union-security provision would not have obligated any of the employees who worked during the strike or any of the transferees or permanent replacements to become members of the Union during the term of the new agreement. (R. Exh. 9.)

As with other explanations provided by Edwards, the reason advanced for proposing the new more limited union-security clause does not stand scrutiny and I find it implausible. According to Edwards, he drafted the disputed union-security provision in order to protect the two probationary employees and the seven transferees (so-called permanent replacements) from "possible (union) retaliation." As noted previously, given Borchelt's testimony that the two probationary employees had informed him that the Union had given them permission to work during the strike, I find it impossible to discern the kind of union retaliation envisioned by Edwards. In any event I fail to see a connection between the proposed change and affording protection for the probationary employees and transferees who worked during the strike. In short, I find Edward's stated concern was pretextual. As such, and on consideration of the total picture, I am convinced that it was not offered in good faith but in furtherance of an overall pattern of conduct calculated to frustrate any meaningful bargaining. In such circumstances it is not surprising that the memberhsip rejected this latest proposal as predicted by Brockmeyer.

In sum, I find on the basis of the "totality of the circumstances" that Respondent since about May 5 entered into a series of regressive proposals without any reasonable or genuine effort to reach common ground and that Respondent refused to enter into a collective-bargaining agreement on anything less than its own terms.[23] Accordingly, I find that Respondent thereby violated Section 8(a)(5) as alleged.

2. The 8(a)(3) allegations; Respondent's obligation to reinstate strikers

Having previously found that since about May 5, Respondent by its failure to bargain in good faith in violation of Section 8(a)(5), had prolonged the strike (economic in its inception), I further find that Respondent thereby converted the strike into an unfair labor practice strike and that the strikers thereupon acquired the full reinstatement rights of unfair labor practice strikers. See *Carpenters Local 1780*, 244 NLRB 277, 281 (1979). As such, Respondent was obligated to immediately reinstate them to their former positions, or substantially equivalent positions of employment upon their unconditional application to return to work, even if striker replacements had to be terminated to make room for the returning strikers. *NLRB v. McKay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Ricks Const. Co.*, 259 NLRB 295 (1981); *Carpenters Local 1708*, supra.

In the circumstances of this case noting that the parties stipulated that the striking employees named in the complaint had all unconditionally offered to return to work and that the record disclosed that some of them were not reinstated immediately, others reinstated in less than substantially equivalent positions, and still others were not reinstated at all,[24] I find that Respondent by such action violated Section 8(a)(3) as alleged.

Assuming arguendo, the striking employees retained their status as economic strikers, they are still entitled to reinstatement on their unconditional application to return to work unless the employer can show "legitimate and

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tinue "until hell freezes over." In short, I am unpersuaded that Borchelt conveyed the impression that Respondent would not bargain in good faith in violation of Sec. 8(a)(1) as alleged. Accordingly, I shall dismiss this allegation.

[23] Counsel for Respondent in his brief correctly points out that the Union's conduct must also be considered in assessing the total context of the negotiations. See *Gerstenslager Co.*, 202 NLRB 218 (1973); *Hudson Chemical Co.*, supra, 258 NLRB at 156 fn. 12. In this connection it is noted, inter alia, that early in the negotiations the parties had mutually agreed to negotiate the noneconomic items first and that the parties had reached agreement on most of these items before the April 1-3 sessions. It was not until Friday, April 3, about 4 p.m., when Respondent first submitted an entire package which also included money items for the first time. As testified by Borchelt, "I was not prepared to negotiate the matter from this point forward at this time." On the other hand, Brockmeyer on behalf of the Union urged Respondent to negotiate over the weekend, before the strike was to commence. Further, the record disclosed that the Union subsequently accepted the April 3 proposal in its entirety and also made counterproposals to Respondent's May 5 proposal but no corresponding movement was forthcoming from Respondent. In these circumstances, and on the basis of the entire record, I find contrary to Respondent, that the Union's conduct did not wrongfully or unduly prevent the parties from reaching a contract.

[24] The record disclosed that Respondent did not offer positions to Francis J. Henigmann, Tom English, and Robert Klindworth. Further, Doug Kleinberg, Al Muelleck, and Robert Farmer were not reinstated until about August 12, September 21, and October 5, respectively. Still further, both Robert Bergfeld and Andy Cherven, project leaders before the strike, did not return to work in that capacity but were demoted with substantial cuts in pay. Bergfeld and Cherven returned to work as draftsmen about June 24 and about October 5, respectively. Roger Rohr, a section leader before the strike, declined a demotion to draftsman with less pay about August 10 and has not returned to work. As stipulated, the striking employees made unconditional offers to return to work on the date set forth opposite their names as follows:

Robert Bergfeld	6/22/81
Doug Kleinberg	6/29/81
Al Muelleck	6/29/81
Roger Rohr	6/29/81
Andy Cherven	6/30/81
Robert Farmer	7/1/81
Francis J. Henigmann	7/1/81
Tom English	7/2/81
Brad Klindworth	7/6/81

substantial business justifications" for not reinstating them immediately. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967); *Sunstate Wholesalers*, 255 NLRB 311 (1981). Refusing to reinstate economic strikers at the conclusion of the strike on the basis that they had been permanently replaced has long been recognized as legitimate business justification. *NLRB v. Mackay Radio & Telegraph Co.*, supra at 345–346; *NLRB v. Fleetwood Trailer Co.*, supra. However, it is also well settled that the "burden" is on the employer to establish that the former strikers have been replaced by permanent replacements. *NLRB v. Fleetwood Trailer Co.*, supra; *Consolidated Dress Carrier*, 259 NLRB 627 (1981); *Mars Sales & Equipment Co.*, 242 NLRB 1097 (1979), enfd. in relevant part 626 F.2d 567 (7th Cir. 1980). As observed by Administrative Law Judge Sherman in *Mars Sales*, "because this assertion is based on matters within Respondent's peculiar knowledge, the burden of establishing its truth rests with the Respondent." (Citations omitted, supra at 1100–01.) In any event, even where the economic strikers are permanently replaced, they continue to maintain their status as employees if they had not obtained regular and substantially equivalent employment elsewhere and are entitled to full reinstatement to fill positions left by the departure of permanent replacements. The *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

In the instant case Respondent contends that it was justified in refusing to reinstate the strikers because business conditions caused it to reduce the number of unit positions from 26 to 17[25] and it had hired nine permanent replacements. These replacements assertedly consisted of two probationary employees who were already working in the drafting department at the time the strike commenced and seven employees who were transferred temporarily from other departments to meet the exigencies brought about by the strike. Borchelt testified that on June 16, Director of Engineering Staack voiced concern about the Company's ability to meet its long-term manpower needs in the drafting department. Later that day Borchelt discussed with Edwards the apprehensions expressed by Staack and it was decided to advise the striking employees of the Company's need to fill their positions permanently. The next day, June 17, Borchelt wrote each of the striking employees advising them that because of the strike and business conditions, the Company had begun the process of hiring permanent replacements. It was also pointed out in the letter that a limited number of jobs were then available and that consideration to returning strikers would be on a "first come, first served basis."[26] (R. Exh. 7.) Borchelt testified without contradiction that on June 18, the two probationary employees as well as the seven temporary transferees were offered and accepted permanent positions in the drafting department.

The circumstances elevating the replacements to permanent status, are highly suspicious. Thus it is noted, inter alia, that the names of the transferees are omitted from the record; that none of them testified; that the record is silent with regard to their previous classifications and ability to perform the struck work; and the apparent great haste taken by Respondent in converting the replacements to permanent status, only one day after its June 17 letter.[27]

On the other hand, according to Borchelt's uncontroverted testimony, all nine replacements were offered and accepted permanent positions. Further, at the time of the trial, five of the replacements were still doing unit work. With regard to the other four replacements, three of them subsequently quit the Company and the other one transferred to another department and their vacancies filled by former striking employees.

Under all the circumstances, noting particularly an absence of evidence tending to contradict Borchelt's testimony that the replacements were offered and accepted permanent unit jobs, I find that the replacements were permanent on June 18 as contended by Respondent. However, having previously rejected Respondent's contention that legitimate business reasons caused a reduction in the number of available unit jobs, I further find that Respondent has unlawfully withheld offers of employment from certain of the strikers as well as having made untimely offers to some of the other strikers. (See fn. 24 supra.) Additionally, for reasons noted below, I find that still other strikers were offered less than substantially equivalent positions of employment.

As noted previously, Bergfeld, and Cherven were project leaders, Rohr was a section leader prior to the strike, and each was offered the lower position of draftsman. Bergfeld and Cherven accepted the demotion and returned to work with substantial loss in pay; whereas, Rohr refused to work under such circumstances.[28]

According to Director of Research and Engineering Gerald Staack, appraisals occur every 6 months. Staack asserted that Bergfeld was told by his supervisor that he was not performing satisfactorily and if he did not meet the standard for the position he would be demoted. Further, Staack asserted that Bergfeld's time for review had come shortly before the strike but because his supervisor was on temporary reassignment the review was not completed. Staack averred that Bergfeld would have been

[25] As no credible, documentary, or probative evidence was submitted to corroborate Respondent's witnesses' assertions that the reduction in unit jobs was caused by a decline in business or other legitimate business considerations, I reject his contention. See *Fabricut Inc.*, 238 NLRB 768 (1978); *Consolidated Dress Carriers*, supra at p. 22.

[26] It is undisputed that before mailing the letter Borchelt called Brockmeyer and read to him its contents. Brockmeyer told Borchelt that he had just received a letter from Edwards withdrawing all of the Company's proposals and that he was "very unhappy with this course of events that the company had chosen to take."

[27] The offer of permanent positions occurred on the same day in which the Union had delivered to Respondent a letter accusing the Company of bargaining in bad faith, along with a copy of unfair labor practice charges. (R. Exhs. 8(a) and (b).) The letter also informed Borchelt "that these [striking] employees are immediately available to report for work." (R. Exh. 8(a).) It is not contended, however, nor do I find that the letter by itself need in its entirety represent an unconditional application by the strikers to return to work.

[28] Bergfeld and Cherven as draftsmen earned approximately $1.75 to $1.90 an hour less than as project leaders. Rohr, as draftsman, would have earned approximately $1.50 an hour less than he had as a section leader.

demoted prior to the strike had the review been completed. Staack also testified that Rohr's supervisor gave him a warning similar to that given to Bergfeld, but acknowledged that neither of them was advised prior to the strike that they in fact would be demoted, although in Rohr's case the appraisal was due shortly after the strike started. Further, Staack testified that he knew of no other leader in the drafting department who had ever been demoted prior to the strike. Bergfeld had served as a project leader for 3 years and Rohr as a section leader for 4 or 5 years.

In the absence of any probative, documentary, or other credible corroborative evidence, I find that Staack's unsupported testimony is insufficient to establish that Respondent was justified in not offering Bergfeld and Rohr their jobs back or substantially equivalent positions. First, I found in critical areas that Staack was largely conclusionary and somewhat uncertain and unresponsive. This was particularly true with regard to Staack's account of the circumstances under which Bergfeld and Rohr were allegedly told that "the Company expected or would require that their performance improve to the acceptable standards if they were to continue in their position(s)." According to Staack, Bergfeld's and Rohr's immediate supervisor memorialized the warnings but he, Staack, did not bring the memos with him to the hearing.[29] Given the fact that Bergfeld's and Rohr's immediate supervisor did not testify and as Staack admittedly did not give them warnings directly and as I did not find Staack to be an impressive or reliable witness, I am unpersuaded and reject Respondent's contention that Bergfeld[30] and Rohr were warned that they faced demotions as testified by Staack.

With regard to Cherven's demotion, Respondent contends that economic conditions reduced the number of unit positions and correspondingly leadership positions and that he was offered the first available position, that of draftsman, which he accepted on October 5. For reasons stated previously, I have rejected Respondent's unsubstantiated contention that economic circumstances caused it to reduce unit jobs. Accordingly, I find that Respondent also wrongfully denied Cherven his former or substantially equivalent position.

In sum, I find for reasons noted above and under all the circumstances that Respondent's conduct was "inherently destructive" of striking employees' rights, whether they be deemed unfair labor practice strikers or economic strikers, and that Respondent thereby violated Section 8(a)(3) of the Act as alleged. See *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33–34 (1967).

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for purposes of collective bargaining:

> All project leader, section leader, and draftsman employees employed by Respondent at its 4660 W. Florissant, St. Louis, Missouri, place of business, excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

4. At all times material herein the Union has been the exclusive collective-bargaining representative of the employees in the unit described in paragraph 3 of this section.

5. Since about May 5, 1981, Respondent has refused and continues to refuse to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit described in paragraph 3 of this section, thereby violating Section 8(a)(5) and (1) of the Act.

6. The strike which began on April 6, 1981, was prolonged by the unfair labor practices of Respondent in its overall course of bargaining since about May 5, 1981, and the strikers thereupon became unfair labor practice strikers.

7. By delaying and/or denying reinstatement to certain of the strikers and denying reinstatement to other strikers to their former or substantially equivalent positions upon the timely unconditional applications made by all the aforesaid strikers to return to work, Respondent has thereby discriminated against the employees named below in violation of Section 8(a)(3) and (1) of the Act:

Doug Kleinberg	Robert Farmer
Al Muelleck	Francis J. Henigmann
Roger Rohr	Tom English
Andy Cherven	Brad Klindworth
Robert Bergfeld	

8. By threatening unfair labor practice strikers in its letter dated June 17, 1981, that they faced being replaced by permanent replacements, Respondent violated Section 8(a)(1) of the Act.

9. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. The General Counsel has not proved that Respondent violated the Act other than those violations described above in this section.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent violated Section 8(a)(5) and (1) of the Act by not bargaining in good faith with the Union, I shall recommend that Respondent be ordered to cease and desist therefrom and to meet, on re-

[29] The memos were not proffered nor was leave requested to furnish them subsequently.

[30] The record is unclear whether anyone specifically replaced Bergfeld or Cherven as project leaders. Nor is it clear why Respondent bypassed Bergfeld for the section leader position when that job became available on August 12. Bergfeld had accepted the offer to return as a draftsman on June 24.

quest, with the Union and bargain collectively in good faith concerning rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees in the unit found appropriate herein and, if agreement is reached, embody it in a signed contract.

It further having been found that Respondent violated Section 8(a)(3) and (1) of the Act by delaying and/or denying reinstatement to certain of the strikers and denying reinstatement to other of the strikers to their former or substantially equivalent positions all of whom had made unconditional offers to return to work, I shall recommend that Respondent be ordered to offer all the unreinstated strikers and those strikers who were reinstated to less than their former or substantially equivalent positions, immediate and full reinstatement to their former or substantially equivalent jobs, without prejudice to their seniority or other rights which they formerly enjoyed, discharging if necessary any replacements.[31] Further, I shall recommend that Respondent be required to make all strikers whole for any loss of earnings they may have suffered as a result of Respondent having violated the Act against them.[32] Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 131 NLRB 716 (1962). Payroll and other records in possession of Respondent are to be made available to the Board or its agents to assist the backpay computation.

Still further, it having been found that Respondent independently violated Section 8(a)(1) of the Act by threatening unfair labor practice strikers with permanent replacements, I shall recommend that it cease and desist therefrom.

While the unfair labor practice findings herein are not inconsequential, it is noted, inter alia, that the record does not reflect any previous history of similar findings against Respondent. Under all the circumstances, I find it appropriate to recommend the narrow "in any like or related manner," injunctive language. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]

[31] As noted previously, Francis J. Henigmann, Tom English, and Brad Klindworth made unconditional application to return to work and none of them have been reinstated. Further, Respondent wrongfully and unlawfully delayed reinstating Doug Kleinberg, Al Muelleck, and Robert Farmer. Still further, Respondent wrongfully and unlawfully delayed reinstating Andy Cherven and reinstated said Cherven and Robert Bergfeld to substantially lower positions to that which were held by them prior to the strike. Similarly, Roger Rohr was offered but declined a substantially lower position to that which he held prior to the strike. For the relevant dates when the aforenamed strikers made unconditional application to return to work and when they were reinstated, see fn. 24 supra.

[32] The record disclosed that on July 22, 1981, Brad Klindworth wrote Respondent stating that he no longer desired to be considered for employment.